Honoring the Court's Past

The Honorable Alex Kozinski*

Good afternoon ladies and gentlemen. It's an honor, and a pleasure, to be back here in your midst. I find it hard to believe that twenty years—two decades—have passed since that day in 1982 when I became chief judge of the United States Claims Court; it seems hardly longer than a couple of months.

Admittedly, I was among the least likely people to be appointed to head the new court. I had never practiced in the Court of Claims and was only vaguely aware of its existence, probably from having read *Crowell v. Benson* in law school. I think I knew the court had a trial division made up of commissioners—I didn't know they were called trial judges—and probably could not have explained what kind of cases were adjudicated there.

My acquaintance with the new court started one day while riding the Metro during the spring of 1982. In those days, I used to read *U.S. Law Week* religiously, even the boring parts at the end where they reported on new legislation and such stuff. I was getting near my stop—it was Farragut North in those days—when I came across a new statute called the Federal Courts Improvement Act of 1982. Yeah right, I thought. How can one possibly improve the federal courts? But, as I read on my eyes opened wide:

The Act created two new courts, the Federal Circuit and the United States Claims Court. I glossed quickly over the Federal Circuit; too ambitious, I thought. Maybe in three years or so I could think about becoming a circuit judge. But the Claims Court retained my interest. The Act provided that the President would be appointing all the judges of that court—fifteen in all—and, most interesting to me, he would also be designating the court's chief judge. "Shezam!," I thought to myself. That's my job!

Over the next couple of weeks I spent considerable time on the phone calling everyone I knew in the White House and Justice Department, explaining to them why I'd be the ideal candidate to be chief judge of the Claims Court. In truth, I don't remember what I said, because I can't think of anyone less suited for that position. In addition to knowing nothing about the court, I knew nothing about trials. My entire career—all seven years of it—had been spent either as an appellate law clerk or as an appellate litigator. I had tried a single criminal case on a pro bono basis and lost.

As you might guess, my calls elicited various reactions. Stunned silence was very common, so was uproarious laughter and derision. It's fair to say that the idea was treated with the lack of enthusiasm it deserved. And, in a just world, that's where it would all have ended, but this was Washington, D.C. A few days after my first round of calls, I started a second round. By this time, the idea seemed not quite so preposterous; the laughter was more muted, the silences shorter. I could tell I was making real progress.

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By the time I made my third round of calls a few days later, the idea seemed to have taken hold. "We might be able to make you a trial judge," one person said, "but I don't think we can swing chief judge—we need someone with more experience for that." Of course, I would cheerfully have accepted an ordinary judge appointment, but I knew I had them on the ropes so I dug in my heels: "No way—it's chief judge or nothing," I insisted. "Okay, then," my friend said, "we'll see what we can do."

After that it went very quickly, and soon the White House sent my nomination to the Senate. I was confirmed by August—some months before the new court even came into existence. At the same time, Justice placed a call to Chief Judge Friedman to inform him that I was the Claims Court's Chief Judge-designate, and so one fine day I entered the National Courts building for the first time to pay a courtesy visit on Judge Friedman.

I knew this was an important visit—my chance to make a good first impression—so I dressed carefully for the occasion. I put on my most conservative brown suit and tie, and managed to find a plain white shirt among the stripes and polka-dots in my closet. As I settled in and started exchanging courtesies with Judge Friedman, I looked down and suddenly noticed I was wearing different colored socks—one brown, another one green. I froze, realizing at once that Judge Friedman and everyone in his chambers would know that the new chief judge of the Claims Court was a buffoon.

Alas, if Judge Friedman noticed, he didn't let on. Ever gracious, he took no notice of my discomfort, and the visit proceeded uneventfully. Judge Friedman told me that there was currently a vacancy in the Trial Division and, if I wished, the Court of Claims was ready to appoint me to the position, so I could get started working on the transitioning of the Trial Division into its new status as an independent court. I gratefully accepted the offer, and, a few days later, I was occupying the corner suite on the seventh floor.

I've recounted the story of how I came to be chief judge of the Claims Court so you will understand just how ill-prepared I was to handle the position. Unfamiliar with the court's jurisdiction, culture, history and tradition, there was every reason to believe that I would make misstep after misstep and turn the whole enterprise into a huge mess. But, it was not to be, and the reason is quite simple: the warm and supportive reception I received from the Claims Court family, a remarkable group of people who made it their business not to let me, or the new court, fail.

Time does not permit me to mention, and thank, everyone who gave me enthusiastic support during those formative weeks and months, but I would be remiss if I did not mention at least a few. And, I can think of no better start than with the court's crusty, lovable, know-everything, do-everything, have-a-view-on-everything clerk, Frank Peartree. When Frank first laid eyes on me, he gave me a long look over, sort of the way a chicken might look at a worm, first with the right eye, then with the left, clenching an unlit pipe between his teeth. I could tell he thought I was real wet behind the ears and was trying to make up his mind if I was the very worst thing that Frank ever called anybody—the embodiment of everything he stood against—namely a rascal. I guess he must have decided that I wasn't a rascal, even though I

sometimes acted like I was wet between the ears, not just behind them, because I think he sort of adopted me. And after that we got along famously.

I'll say this much for Frank: he was not the kind of employee where you were worried that he might be afraid to speak his mind. No, indeed. If he didn't agree with what you did, he'd tell you to your face—more than once if he thought it was necessary. If you were dumb enough to do it anyway, he'd harrumph and mutter, chewing his pipe, for weeks on end. But, I can also tell you this: he was loyal and one-hundred percent reliable; whether he agreed or not, he'd carry out orders to the letter. And when it turned out he was right all along—which happened more often than I'd care to admit—he didn't come back and rub it in with a lot of I-told-you-so's.

Roger Neiman, Belle Yeates, Bill Hare, Dale DeBuhr, and the rest of the clerk's office staff seemed a little nonplussed at our first meeting, but I soon won their confidence with my brilliance and savvy. Well, not quite. I bought them off with a big batch of Kozinski Squares—big, goopy, caramely, instantly addictive brownies. Those of you who haven't tasted Kozinski Squares, alas I pity your wasted life up to now, but right here in front I have copies of my recipe, which I would happily autograph after lunch.[1]

Of course, the biggest asset of the new court was the extremely able cadre of judges—those who were on board at the time of my arrival and those who arrived shortly afterward. There were—and here I really hope I didn't forget anybody—the former chief of the Trial Division, Phil Miller, and (more or less in descending seniority) Lou Spector, Harry Wood, Joe Collaiani, Ken Harkins, Tom Lydon, John Wiese, Bob Yock, Judy Yanello, Jim Merow, and Bob Seto. David Schwartz was in the process of clearing out his office; he explained to me that he had had three prior careers—fifteen years in private practice, fifteen years at Justice, and fifteen years at the Court of Claims—and wanted to leave and start his next career while he was still young.

George Willi was in the building finishing off an opinion—I think he was still there when I left more than three years later—and he would stop in my office every so often to offer me sage, though often cryptic, advice: "No point plucking two chickens with one hand tied behind your back." I wasn't always quite sure what he meant, but gave him a knowing nod and he'd go back to writing up his opinion, long-hand. For all I know, he's still at it.

Among the judges, I must not forget Mastin G. White, the court's èminence grise. I'll say more about Mastin in a bit, but here I just want to confirm what both Judge Friedman and Judge Miller had told me when I first met them: Mastin was a machine when it came to handling cases. As our only full-time senior judge, he carried a full load and, by any standard, resolved more cases every year than any of our active judges. And, it didn't matter how you measured productivity—by the number of trials, the number of opinions, the number of cases disposed of—Mastin consistently held the lead. Not bad for a guy born on January 1, 1901!

I tried, in those first few weeks, to sit down and have a chat with everybody, just to get their views on what was going on and what needed to be

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[1] The recipe is also available online at http://server.kozinski.com:8080/~alex/ksquares.rtf.

done. My secretary, Donna Salter, and I went from office to office, and I would go in and talk to the judge, and she'd get the real story by talking to the secretary. Afterwards, Donna and I would compare notes and put together a list of projects that needed attention, and there sure were plenty of them. Here are just a few:

* The court needed to adopt new rules, preferably by the time we opened for business on October 1.

* The courtrooms were in terrible shape. They needed upgrading pretty much from top to bottom.

* The court had no official reporter. How would the court's decisions be made available to the bar? Someone had to persuade West or one of the other law presses to start a new reporter series for claims-court decisions.

* Because several judges were retiring, and it would be some time before new judges were appointed, there were hundreds of cases essentially in limbo, with no one responsible for them. One of the judges pointed to a row of some twenty file cabinets, lining a corridor on the fifth floor. "That's a single case," he told me; "it was filed in 1950"—the year I was born. "Whose case is it," I asked Frank Peartree. "Well," he said, "it used to belong to Judge Roald Hogenson, but now I guess it's yours."

* There were two, maybe three word processors in the court; secretaries had to sign up well in advance to use them. Law clerks were seldom allowed near them at all. The court's facilities were generally old and decrepit and badly needed an overhaul.

* Some of the judges, whose term would expire over the succeeding four years, had no idea whether they were going to be appointed to a full term, or would have to find employment elsewhere.

As Donna and I went over the list of problems and issues that needed to be addressed, we also noticed a significant number things that were NOT problems. First, for an institution that was undergoing a significant amount of turmoil, spirits were remarkably high. There was practically no finger-pointing, complaining, or back-biting. Basically, everything we heard was helpful and constructive.

Second, there was no lack of goodwill—on the part of judges and staff—to do what was necessary to get the new institution off to a great start. Would you be willing to take twenty or thirty additional cases while we're awaiting our new judges? Of course, no problem at all. Are you willing to serve on the rules committee or some other committee to deal with specific problems? No one ever refused. There was not only a willingness to work on projects, but also a spirit of compromise in solving problems. I recall we had a few stormy sessions regarding the new rules, for example, but in the end we agreed and our vote was unanimous. Everyone was willing to give a little to get the court off to a good start.

Finally, the court was blessed with an extraordinarily able, resourceful, and cooperative staff. In addition to the fine folks in the clerk's office that I've already mentioned, there were the judges' personal staff, particularly the secretaries such as Juanita Dooley who worked for Judge Miller; Nonna Aleotti, Judge Harkins's secretary; Eugene Sanders, Judge Merow's secretary;

Judy Kreider, Judge Weis's secretary; Dorothy Kemper, Judge White's secretary; Mickey Cunningham, Judge Yock's secretary; Irma Dunn, Judge Lydon's secretary; and Mary Welday who started out working for me, but then traded up—and I do mean way up—when Judge Tidwell joined the court. And then there were the two Mary's that I brought into the court, and then remained after I left, as treasured employees. I'm speaking, of course, of Mary Sloan and Mary Bays. Harder working, more dedicated, or more efficient staff is hard to imagine. The other person I brought in who has proven his worth to the court many times over is, of course, Gary Golkiewicz.

And let us not forget the man who knew how to fix everything and never seemed to go home: the fabulous Chuck Leath. You had a problem with your telephone, you'd call Leath. You had a problem with your parking spot, you'd call Leath. The cleaning people forgot to empty your waste basket, you'd call Leath. You needed furniture and heavy equipment moved in and out of the building, you'd call Leath.

Donna and I used to joke that there were really only two indispensable people in the whole court—Peartree and Leath. If all the judges one day had decided to take a holiday for a month, all at the same time, we were convinced we'd find everything in order when we got back, so long as we left those two guys in place.

So one fine day at the beginning of October 1982, we all gathered in the great ceremonial courtroom on the fourth floor, in a session presided by Chief Justice Warren Burger. The Chief Justice administered the oath of office, and we all looked at each other—we were no longer what David Schwartz told me were glorified law clerks of the Court of Claims. We were real judges of a real court. We could be reversed, but we could no longer be edited—or fired.

There were many fine speeches on that occasion, but none finer than that of Senator Strom Thurmond, Chairman of the Judiciary Committee. Senator Thurmond ambled up to the lectern with a spry step, wearing a plaid jacket so bright it lit up the room. He first apologized to the court—and the Chief Justice—for wearing what he called his "hoss-racing jacket." That got a good laugh and put everyone at ease. Then, he talked a bit about the duties of a judge, learned from his experience as a "cicut judge" in South Carolina. (My wife, who worked for Strom, later explained to me that "cicut judge" meant "circuit judge"—the court of general jurisdiction in the Senator's home state.) Anyway, Senator Thurmond talked about what happens when you put on the robe and become a judge—I can still remember his words as if they were spoken yesterday. He said: "When you put on that robe, you enter an ultra-world, where you have to do the right thing. You just can't help yourself." I've never forgotten those words; often when I put on my robe, I think of Senator Thurmond standing there in his hoss-racing jacket talking about entering the ultra-world of a judge. And, you know, he was absolutely right. All of us who are privileged to wear the robe know exactly what Senator Thurmond was talking about.

Not long afterwards, we started getting our reinforcements—and excellent ones they were: My friend Bob Mayer, followed by Reggie Gibson, Chris Nettesheim, and Larry Margolis. And they were joined, a year or two later,

by Moody Tidwell and Marian Horn. Each of these judges brought new strengths and new creativity to the institution and was an important source of vigor and rejuvenation for the court. Together, we started to develop various innovations to help move our caseload along and make ourselves more useful to the lawyers and parties that appeared before us. Among them was the previously unknown use of bench rulings, and conducting hearings via telephone conferencing, saving lawyers from across the country the need to fly into Washington for routine matters. Soon, we started to see a genuine decrease in our backlog, and even those endless rows of cabinets lining the walls on the fifth and sixth floors began to disappear.

The story would not be complete without acknowledging the enthusiastic and generous support of the lawyers who appeared before our court. Without their hard work and professionalism, this court would not be the great institution it has become in the last two decades.

Law students often ask me the following question: Putting aside the question of resume value, what do you think is the best possible clerkship a graduating law student could have? Of course, the Supreme Court no longer takes graduating law students as clerks, so I put that court out of the running. Of the remaining courts, I tell them—and this includes my court, other courts of appeal, district courts, and bankruptcy courts—the best clerkship you can have is with the Court of Federal Claims. Why? It's very simple: it's the quality of the bar, unequaled in any court in the country, perhaps not even the Supreme Court. This sounds like hyperbole, but it's not. Very important cases are filed in all federal courts, but the likelihood that you are going to work on something truly interesting and important is far greater during your year at the Court of Federal Claims than any other inferior federal court. The sums involved are often staggering, the principles of law are complex and subtle, and the parties are usually very well represented.

During my three years at this court, I (as a single trial judge) had three cases that went all the way to the United States Supreme Court. It took me twice that time to see three of my appellate cases before the Supreme Court—and I come from the Ninth Circuit, where getting the Supreme Court to take a look isn't all that hard. In another case, I issued an oral ruling on a difficult issue of first impression, holding in favor of the plaintiff and against the government. I noted, however, that the issue was important and difficult and promised to issue an opinion stating my reasons more carefully. A couple of weeks later, before I had a chance to issue my opinion, the parties informed me that Congress had passed a statute reversing my ruling. In the seventeen years I've been in the Ninth Circuit, the only time Congress has come close to doing anything like this is when a panel of our court held part of the Pledge of Allegiance unconstitutional.

Given the importance of the cases, it is far, far more usual to see excellent representation in the Court of Federal Claims; quite simply, the cases warrant hiring the best lawyers money can buy. On the other side of the case, appearing for the single defendant, the United States, are a corps of amazingly professional lawyers from three divisions of the Department of Justice: Civil, Tax, and Lands and Natural Resources. And, unlike the Supreme Court, where the prestige of the appearance often means that the

counsel who argue the case are not those who actually worked it, the lawyers who appear before the Court of Federal Claims are the ones who know the case inside and out.

During my three years at the Claims Court, I saw extraordinary examples of advocacy, with a frequency unequaled in my own court or the District Court for the Central District of California, where I occasionally sit. Among those appearing for the government were such consummate professionals as Millie Seidman, Jim Brookshire, David Cohen, Vito Dipietro, Steve Lambert, Ted Peyser, Gil Rubloff, Helene Goldberg, Tom Petersen, George Squires, Israel Shetreat, Jane Bergner, Michael Dennis, and Michael Morin. Representing plaintiffs, I witnessed virtuoso performances from lawyers all over the country, such as John DeVault, Frank Gregory, Randy Thrower, Sara Lister, Alan Raywid, John Siever, George Miller, Ralph Muio, Robert Moore, the incomparable Bernie Aidinoff, and, my personal favorite, the brilliant and funny Marty Ginsburg. One might go for many years in any other court before one would see such a remarkable collection of legal talent.

But the lawyers' support of the new court didn't end in the courtroom. Soon after I became chief judge, a group of lawyers, both from the private bar and the government, came to see me with the idea of organizing an Advisory Council—a group of lawyers that would act as a bridge between the court and the bar, and could also help promote the court's interests with Congress and the administration. I must admit that I was not as enthusiastic about the idea as I should have been, but I figured it couldn't hurt, so I gave it a luke-warm endorsement. It turns out to have been one of the best things I ever did during my tenure as chief judge. Under the energetic and tireless leadership of Clarence Kipps, the Advisory Council has been of enormous help to the court and to my successor chief judges.

So, what do I consider my greatest achievement as chief judge of the Claims Court? There were really two and both involved my special talent—the very talent that got me appointed chief judge in the first place. I call it my "schmoozability." The first one of these involved Judge Mastin White. Mastin had been a judge of the old Trial Division and, though he carried a full load, had taken senior status. As I already mentioned, he was incredibly productive and the lawyers on both sides just loved him because of the speed with which he decided cases, his courteous and gentlemanly demeanor, and because he usually got it right—no doubt the most important attribute for a judge.

The problem was, as Chief Judge Friedman pointed out to me during our initial meeting, the statute that created the Claims Court did not have a provision dealing with senior judges of the old Trial Division. Regular judges of the old court would automatically become judges of the Claims Court, and if they then took senior status, they were eligible for recall as senior judges. But, the statute said nothing at all about what happened to individuals who were already senior judges at the time of transition.

The problem was a difficult one and it landed directly in my lap. As chief judge, I had authority to recall to service anyone who was a bona fide senior judge of the new court, but I had no authority to recall anyone who had been a senior judge of the old Trial Division. As Judge Friedman

pointed out to me, come October 1, 1982, I had to make a choice. I could simply recall Judge White to service and wait for a losing party to challenge his authority on appeal to the Federal Circuit. This was not a very attractive option, because it could take a year or more for the issue to be resolved and in the meantime the cases on his docket would be in jeopardy. Or, I could play it safe, refuse to recall Judge White, and distribute his cases to the court's other judges. This option too was not terribly attractive. Not only would the court lose its biggest producer, but I thought it was cruel and unseemly to throw Judge White and his staff out the courthouse door when they were willing and able to do the court's work.

This is where my special talent came in. One fine morning I called a friend of mine in the White House Counsel's office and told him I needed to discuss an important matter with him. He asked me to come right over and, as you know, it isn't too far. I explained the situation to him and proposed a solution: have President Reagan appoint Mastin White as a judge of the Claims Court. He could hold the commission for a day, and then immediately take senior status—he was clearly eligible—and I could then recall him as a senior judge. My friend looked at me like I had lost my mind: "You are asking the President to appoint an 81-year-old Democrat to a fifteen-year judicial position?" "That's right," I said. "What if he doesn't retire," my friend asked. "He'll do it," I said, "he gave me his word."

I guess I hadn't lost my knack for getting the administration to do the totally unthinkable, because after a few more conversations with people in the White House and Justice, they agreed to do it. And so it came to be that Mastin White became the only person in history to hold appointments from two very different Presidents. Having been appointed Solicitor of Agriculture by President Roosevelt, he now had on his wall a judicial commission signed by President Reagan. And, as I'm sure everyone has guessed, he promptly kept his word by retiring, thus keeping the position open for the eventual appointment of Moody Tidwell.

And what was my second great achievement? That came in 1985, when I persuaded the White House—again contrary to all common sense—to appoint me to the Ninth Circuit. This, of course, created a vacancy, which made room for the appointment of the court's greatest chief judge, Loren A. Smith. And it is during the fifteen years of his truly inspired leadership that the Claims Court got a new name and firmly established its stature as one of this country's greatest courts—an institution of truly national stature.

Thank you very much.